TRANS RESOURCES CORP SDN BHD

v.

SANWELL CORP & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-22-42-1998]
10 NOVEMBER 1998

CIVIL PROCEDURE: *Stay of proceedings - Arbitration agreement - Plaintiff's application for summary judgment and defendant's application for stay pending reference to arbitration - Whether both applications can be heard together*

The 1st defendant had engaged the plaintiff to carry out certain earthworks in Johore. Under the terms of the contract, any dispute or difference between the plaintiff and the 1st defendant was to be determined by an arbitrator.

As it transpired, disputes arose in respect of *inter alia* payment for work done, which lead to the plaintiff filing a suit and applying for summary judgment. The 1st defendant applied for a stay of the proceedings on the premise that the matter ought to be referred to arbitration as per the contract. By way of a preliminary issue, the plaintiff and 2nd defendant submitted that both applications ought to be heard together as the search for "a dispute or difference" in connection with s. 6 of the Arbitration Act 1952 ('the Act') was similar to the enquiry on whether there existed a "defence" or "triable issue" in the summary judgment proceedings. This submission was opposed by the 1st defendant.

Held:

[1] When a court is faced with a stay application and an application for summary judgment, the proper course to adopt would be to hear the stay application first.

[2] A defendant is required to make an application under s. 6 of the Act **before** taking any steps in the proceedings. Defending an application for summary judgment is clearly taking a step in the proceedings which would preclude the 1st defendant from reverting to his right to have the matter arbitrated.

[Stay application to be heard first; costs in the cause.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(refd)***

Gaya Electric Supply Co Ltd v. State of Bihar AIR (1953) SC 182 ***(refd)***

Interscope Versicherung Sdn Bhd v. Sime AXA Assurance Bhd [1995] 3 MLJ 661 ***(foll)***

Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 ***(foll)***

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(foll)***

Seniwisma S & O Akitek Planner v. Perusahaan Hiaz Sdn Bhd [1980] 2 MLJ 37 ***(refd)***

SL Sethia Liners Ltd v. State Trading Corp of India Ltd [1986] 2 All ER 395 ***(not foll)***

Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat [1996] 1 CLJ 231 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6

For the plaintiff - CC Choo; CC Choo & Co

For the 1st defendant - HL Ooi; M/s Cheang & Ariff

For the 2nd defendant - Logan B Sabapathy (TJ Chin with him); M/s Logan Sabapathy & Co

Reported by Cindy Chan

JUDGMENT

RK Nathan J:

Facts

By an earthworks contract (the said contract) dated 30 October 1996 between the 1st defendant and the plaintiff, the 1st defendant engaged the plaintiff to carry out earthworks for a theme park in Johore known as the Agarta Theme Park (the Thema Park). The total contract sum was in the region of RM24.1 million. As a collateral for the payment of the works done in pursuance of the said contract, the 2nd defendant granted an irrevocable guarantee in favour of the plaintiff up to an aggregate sum of RM15.5 million (the guaranteed sum). The said contract contained an arbitration clause which required that any dispute or difference between the plaintiff and the 1st defendant arising in connection with the said contract be referred to and determined by an arbitrator. The plaintiff commenced

work. It was *inter alia* a term of the said contract that if the cost of the earthworks exceeded the guaranteed sum, and the excess amount was not secured by any additional guarantee the plaintiff was entitled to stop the earthworks.

On 3 June 1997 the plaintiff informed the 1st defendant that the cost of the earthworks done had reached the guaranteed sum and sought approval to perform works exceeding the guaranteed sum. The plaintiff also informed the 1st defendant that it would stop work if approval and/or the additional guarantee was not forthcoming. The 1st defendant did not respond. The plaintiff thus gave notice of termination pursuant to the relevant clause in the said contract. Upon the plaintiff complying with the requirements of the contract by delivering to the defendants and to the project architect the required reports, the project architect issued a final certificate for RM17,459,445.69 for works done under the said contract. Although demand has been made, the defendants have failed to effect payment. Hence this suit. The plaintiff has filed an application (encl. 8) for summary judgment against the defendants. By way of encl. 13, the 1st defendant seeks to stay the present proceedings on the premise that the matter ought, in accordance with the said contract be referred to arbitration for its resolution.

The Preliminary Issue

Both the 2nd defendant and the plaintiff contend by way of a preliminary issue that the plaintiff's application for summary judgment (encl. 8) and the 1st defendant's application for a stay of proceedings (encl. 13) ought to be heard together and that encl. 8 be determined first and in respect of any balance in dispute, the matter be referred to arbitration. The 1st defendant opposes this proposition.

Findings Of The Court

Pivotal to the 2nd defendant's and the plaintiff's stand is the view that the search for the existence of "a dispute or difference" to be arbitrated in considering an application for a stay of proceedings under s. 6 of the Arbitration Act 1950 is fundamentally the same as the enquiry to be made as to whether there exists a "defence" or whether there are "triable issues" in the application for summary judgment.

It is normal that in construction contracts when the contractor files a recovery claim followed immediately with an application for summary judgment, the said application would generally be met by a cross-application from the employer to stay the action pending arbitration. This poses the immediate problem to the court as to which application should be heard first.

The 2nd defendant and the plaintiff rely heavily on the basis that arbitration agreements generally make it a pre-condition of the right to arbitration that there first be "a dispute or difference" between the parties about a matter covered by the arbitration agreement. Referring to the affidavit evidence of the respective parties, the 1st defendant argued that it had in its affidavit disputed the plaintiff's claim whereas the plaintiff has in its affidavit contended that "there is no defence to this action". Relying on the words of Kerr J in *SL Sethia Liners Ltd v. State Trading Corp of India Ltd* [1986] 2 All ER 395 the 2nd defendant described such cross-applications as being "reverse sides of the same coin."

In *Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 Peh Swee Chin J (as he then was) held that similar cross-applications could not and should not be heard together at the same time and directed that the application for stay be heard first. I note that the judgment of Kerr J in *SL Setia* was not referred to Peh Swee Chin J. K.C. Vohrah J also took a similar view in *Interscope Versicherung Sdn Bhd v. Sime AXA Assurance Bhd* [1995] 3 MLJ 661. Unfortunately again neither the decision of Peh Swee Chin J nor the decision of Kerr J was referred to K.C. Vohrah J by counsel. Whilst it is obvious that the views of these two experienced judges must be given serious consideration, it would have been complete if relevant decisions had been referred to them by counsel, for their respective considerations.

Section 6 of the Arbitration Act 1952 (the Act) reads as follows:

> 6 Power to stay proceedings where there is submission to arbitration
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

It is settled law that in the face of an agreement to arbitrate disputes, the court will generally allow a stay of proceedings pursuant to s. 6 of the Act, on the basis that effect ought to be given to the express agreement of the parties to arbitrate. This policy is encapsuled effectively and succinctly by Edgar Joseph Jr SCJ in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at 112 when he said:

> ... the approach of the court will be that those who make a contract to arbitrate their disputes, should be held to their bargain for, in the oft-quoted words of Martin B in *Wickham v. Harding* ([1859] 28 LJ Ex 215), 'A bargain is a bargain, and the parties ought to abide by it, unless a clear reason applies for their not doing so.'

Therefore what in essence has been agreed between the parties in an arbitration agreement is that certain identified disputes between them are sought to be determined by a tribunal, other than the court.

I reject the view adopted by Kerr J and adopt the view of Peh Swee Chin J (as he then was) and K.C. Vohrah J. The view of the 2nd defendant and the plaintiff is that the determination of the existence of a dispute to be referred to arbitration entails an enquiry into whether the alleged dispute is in fact indisputable. It was also submitted that this enquiry may properly be equated to the enquiry undertaken in summary judgment proceedings to discover whether or not a defendant has made out an issue to be tried. It was the case of the 2nd defendant and the plaintiff that once the court decides that the alleged dispute or any part thereof is in fact indisputable, summary judgment ought to be entered for that indisputable part of the plaintiff's claim and the remainder, being the disputed parts be referred to arbitration and hence warranting a stay.

As I had said this view is flawed. It is clear that an application for a stay of proceedings under s. 6 of the Act is available to a defendant "in respect of any matter agreed to be referred to arbitration". The essence of an agreement to arbitrate is that when a dispute or difference or question between the parties arise, it would be referred to arbitration for its resolution. However the exact nature of the dispute, or difference or question would vary from agreement to agreement. It is therefore my judgment that it is in this context that the court is called upon to ascertain whether there is a dispute or a difference or a question to be decided, falling within the arbitration clause *(see Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231; [1995] 3 MLJ 273, 279 FC and *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400; [1991] 3 MLJ 309, 312, SC).

It is obvious to me that in placing emphasis on the need for there to be a dispute in a stay application pursuant to s. 6 of the Act, learned counsel for the 2nd defendant and the plaintiff have perhaps overlooked the fact that it is not the existence of a dispute *per* se that has to be determined, but the existence of a dispute within the sphere of the arbitration clause.

Thus it is patently clear that, to approach the question of whether there is a dispute in a stay application pursuant to s. 6 of the Act, from the point of view of whether the defendant has made out a triable issue to defeat an application for summary judgment, when viewed against the all important criteria of the dispute having to fall within the agreed scope of the arbitration clause for the purposes of such an application and bearing in mind the predominant public policy of holding parties to their bargain, the earlier view is wrong and unacceptable.

In fact in comparing the criteria applied by the courts in respect of applications for summary judgments and for stay under s. 6 of the Act it is obvious that there are varying criteria.

In examining the nature of the court's enquiry as regards a dispute in a stay application Gopal Sri Ram JCA sitting in the Federal Court in *Juta Bena (supra)* observed as follows:

(a) Referring to *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400; [1991] 3 MLJ 309 he said that the dispute or difference need not be developed nor full blown prior to issuance of the writ to constitute a dispute/difference for the purpose of a s. 6 application.

(b) There is no requirement that the dispute or difference be *bona fide.*

(c) To require the court to ascertain that the dispute was *bona fide* would *inter alia* require the court to undertake a **critical examination of the merits** of the claim and that such an exercise is neither contemplated by the Act nor within the parameters of the court's function under a s. 6 application.

(d) With reference to the Indian case of *Gaya Electric Supply Co Ltd v. State of Bihar* AIR [1953] SC 182 which considered an application for stay of proceedings under the Indian equivalent of s. 6 of the Act he adopted the observation of the learned judge therein, that the validity of either parties' contention in a suit cannot be gone into by the court exercising jurisdiction under a s. 6 application, as the only point to be decided "is whether the claim which is brought – whether it is good, bad or indifferent – comes within the submission to arbitration".

(e) That the strengths and weaknesses of the issues raised by the defendant must await the decision of the tribunal especially chosen by the parties to decide the differences between them.

(f) Only where it is plain and obvious, without any meticulous examination of the merits, that the dispute alleged by the defendant is frivolous or vexatious may the court be justified in refusing stay.

In summary, the true nature of the enquiry to uncover the existence of a "matter agreed to be referred to arbitration" in an application for stay of proceedings is to enquire as to what is the alleged dispute or difference and then to look at the words of the arbitration clause to decide whether or not the alleged dispute falls within its terms. There is, pursuant to the *Juta Bena*, no enquiry to be made into the *bona fides* of the dispute nor to its strength and weakness.

On the other hand, in respect of an application for summary judgment the court is merely concerned, in an appropriate case, to see if there is any need to obviate the necessity of a trial and hence not delay judgment for the plaintiff. In such an application the plaintiff has to clearly show that there is no defence to the case at all (see *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 FC). The court must also look to see if the defence has raised any triable issues. If the issue to be decided rests solely upon a question of law without reference to any fact or where the facts are clear and undisputed and if the court is satisfied that the legal point is unarguable the court will grant summary judgment (see *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 MLJ 400 SC. In an application for summary judgment the court is duty bound to consider the *bona fides* of the claim and whether the issues raised in the defence are meritorious. (see *Seniwisma S & O Akitek Planner v. Perusahaan Hiaz Sdn Bhd* [1980] 2 MLJ 37 FC). The court is also empowered to grant conditional leave to defend.

That there clearly exists a distinction between the criteria to be applied in respect of both these applications is emhasised by Hashim Yeop Sani CJ in *Perbadanan Kemajuan Negeri Perak (supra)* when he said at p. 312:

> At the outset it may be observed that the learned judge had to deal with two applications which actually required him to apply different formal criteria. The criteria for the grant of summary judgment and for the grant of a stay are not the same.

There is one other factor that I ought to consider. A defendant is required to make an application under s. 6 of the Act **before** taking any step in the proceedings. To my mind defending an application for summary judgment is clearly taking a step in the proceedings which would preclude the defendant from reverting to his right to have the matter arbitrated. It seems contrary to accepted principle and the provision of s. 6 of the Act to require on the one hand that a defendant act with all speed in filing

his application for a stay before taking any step in the proceedings, and yet on the other hand to require the same defendant to simultaneously defend an application for summary judgment with vim and vigour.

In the circumstances, I will take the view that when a court is faced with a stay application and an application for summary judgment, the proper course of conduct to adopt would be to hear the stay application first. Finally I must acknowledge the extensive and illuminating research and arguments of all three counsels. I order that costs be in the cause.

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